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No. 86-___

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CYRIL J. SMITH, JR.,

Petitioner,

VS.

THE STATE OF TEXAS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST SUPREME JUDICIAL DISTRICT OF TEXAS

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PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST SUPREME JUDICIAL DISTRICT OF TEXAS

The Petitioner, Cyril J. Smith, Jr., prays that a Writ of Certiorari be issued to review the decision of the Court of Appeals for the First Supreme Judicial District of the State of Texas in his case.

QUESTIONS PRESENTED

1) Did the search of a locked container, a bank bag which the police knew belonged to Petitioner, violate the 4th and 14th Amendments to the United States Constitution, whether that search was incident to the execution of a search and arrest warrant for Petitioner's roommate at their shared residence?

2) In a criminal case, does a State deny a Defendant his due process right to present a defense by refusing to provide limited use immunity to a defense witness possessed of material and exculpatory testimony and whom the State has otherwise shown no interest in prosecuting?

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OPINIONS BELOW

No written opinion was rendered by the 184th District Court of Harris County, Texas on the issue of the legality of the search. A written order was issued by this Court denying the Petitioner's Motion for Defense Witness Immunity (R.I. 27, Appendix, p. 6a).

By opinion dated February 27, 1986, the Court of Appeals for the First Supreme Judicial District affirmed the Petitioner's conviction. (Appendix, p. 1a). Timely Petition for Rehearing was denied on April 17, 1986. A timely Petition to the Texas Court of Criminal Appeals for discretionary review was subsequently filed and denied on October 15, 1986. A timely Motion for Rehearing was denied on December 30, 1986. The opinion of the Court of Appeals, styled *Cyril J. Smith, Jr. v. The State of Texas* is found at 708 S.W.2d 518.

JURISDICTION

This case is presented to the Court pursuant to 28 U.S.C. § 1257(3) for denial of Petitioner's rights arising under the Constitution. The Petition for Rehearing in the Court of Criminal Appeals of Texas was denied on December 30, 1986, ending the proceedings in that Court. This Petition is, therefore, timely filed pursuant to Sup.Ct.R 20.4.

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT 4

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no

warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

AMENDMENT 5

No person shall be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use, without just compensation.

AMENDMENT 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have cumpulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT 14

Section 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of

the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case arose as a result of the execution of a warrant to search the residence of John Lampis for evidence of the promotion of gambling[1] at 2610 Yoakum Boulevard (R.II, 216-241). No warrant was ever obtained for the search of Petitioner's part of the residence (R.II, 9-10).

The warrant in this case authorized the search of 2610 Yoakum and the arrest of John Lampis (R.I. (Supp), 113). Upon execution of the warrant, the police found and arrested the Petitioner, Cyril Smith, who identified himself (R.II, 113). During the search which followed, the officers found a locked bank bag with Smith's name on it and in Smith's bedroom closet (R.II, 125). The officers asked who the bag belonged to and were informed that it belonged to the Petitioner (R.II, 123). However, the key to the bag was in the possession of Ellen Claire O'Connell, who also shared the residence and who was not on the scene at the time the officers desired to open the bag (R.II, 124).

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[1] Not long after which the Colurt of Criminal Appeals declared the promotion of gambling statute to be unconstitutionally vague. *Adley v. State*, 718 S.W.2d 682 (Tex.Cr.App. 1985).

One of the officers involved in the search then cut open the bag with a pocket knife and a quantity of cocaine was found which formed the basis for the present prosecution (R.II, 125).[2]

These and other facts were developed at a hearing on Petitioner's Motion to Suppress[3] (R.I., 10, R.II, R.III) which the trial judge overruled (R.III, 78).

During the trial which followed, the Petitioner attempted to obtain the testimony of two eye witnesses to the case, Ellen Claire O'Connell (R.VIII, 206-213) and John Lampis (R.VII 197-204). A motion to immunize these two witnesses was filed (R.I., 25). Both witnesses claimed their rights under the fifth amendment after they were advised that their testimony might be used to prosecute them (R.VII, 207-208, R.XII, 11). Petitioner's request to have the witnesses immunized was overruled by the trial court (R.I, 27, Appendix, p. 6a).

The Petitioner was on federal probation at the time these events occurred and after his trial in the State Court, the government filed a motion to revoke the probation in the United States District Court for the Southern District of Texas, Cr. No. H-3-79-326M. The

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[2] A small amount of cocaine was also found on the coffee table of the living room. Had the cocaine found in the bank bag been suppressed, the amount of cocaine would have been less than 28 grams with a consequent reduction in penalty exposure. V.A.T.S., Art. 4476-15, Section 4.04(b). See remarks of Judge Weaver, Supplemental record at p. 108-109.

[3] Both Judge Price and Judge Weaver conducted hearings on the suppression motion, however, only Judge Price issued a ruling. Judge Price issued his ruling only after advising Petitioner that he did not wish to hear further argument and inviting him to present his claims to a higher court. *Id.*

Honorable Calvin Botley, United States Magistrate, heard the government's motion which alleged violation of the conditions of probation on the basis of the substantive facts of the state court criminal prosecution. At this hearing, Magistrate Botley conducted an in camera examination of Ellen Claire O'Connell and after completion of the hearing, overruled the government's motion to revoke and ordering Petitioner discharged from probation. (Appendix, p. 3a).[4]

In his appeal to the Texas Court of Appeals, Petitioner contended that the denial of immunity for his defense witnesses deprived him of his rights under the 6th amendment complusary process clause, and the 14th amendment due process and equal protection clauses (Brief of Appellant at p. 2). The Court of Appeals rejected these contentions in a published opinion. *Smith v. State,* 708 S.W.2d 518 (Tex.App. 1st Dist. 1986). The Court's decision is based on the notion that defense witness immunity is not provided by state law. *Rose v. State,* 486 S.W.2d 327 (Tex.Cr.App. 1972).

The Petitioner also challenged the validity of the search on the 4th Amendment grounds that it invaded his individual right to privacy in both the Court of

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[4] The indictment alleges the offense occurred on October 16, 1982 (R.I., Supp., 6). Because O'Connell was never charged with the offense, the statute of limitations on the offense has run, Article 12.01(4) V.A.C.C.P., and the witness, who was previously granted in camera "immunity" by the federal court, is now available to testify. Under current state law, such newly available evidence may serve as a basis for a new trial, event at this late date. *Whitmore v. State,* 570 S.W.2d 889 (Tex.Cr.App. 1977).

Appeals (Brief, p. 13) and Court of Criminal Appeals (Motion for Rehearing, p. 5). The Court of Appeals declined to review the issue because no authority was cited to show that Petitioner was not covered by the warrant, and because the Court overlooked certain evidence in the record showing Petitioner did in fact maintain a separate residence. 708 S.W.2d at 524. The Court of Criminal Appeals overruled these contentions without comment.

REASONS FOR REVIEW

The Court has never passed on the issue of defense witness immunity. *Pillsbury v. Conboy,* 103 S.Ct. 608 at 621 (1983). As a result, a mirad of conflicting opinions have arisen in the various jurisdictions relating to the issue.[5] The decision of the Texas Appellate Court in this case is in conflict with a line of third circuit cases cited by Judge Marshall in his dissent in *Autry v. McKaskle,* 104 S.Ct. 1458 (1984), and as observed by Judge Marshall in that dissent, a conflict in the federal circuits exists with respect to whether due process ever requires the grant of immunity to a witness who possesses exclupatory evidence for the defense.

The Texas Appellate Court decision is also contrary to the decision of the Circuit Court of Ohio, *State v. Broady,* 321 N.E.2d 890 (1974), wherein the Court, relying on a state statute which places a duty on the

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[5] In the event this Court grants the writ, a brief showing in detail what each of the jurisdictions have held will be submitted. For a glimpse of these diverse views, see the cases collected under 4 A.L.R.4th 617.

prosecution to disclose exculpatory evidence, held that limited use immunity should have been granted to a defense witness. The Ohio statute in *Broady* is nearly identical in its language to a corresponding Texas statute, Article 2.01 V.A.C.C.P. Both statutes codify the principles set down by this Court in *Brady v. Maryland,* 83 S.Ct. 1194 (1963). Because the grant or denial of witness immunity has traditionally been viewed as being within the exclusive discretion of the prosecution, Courts have held that a Defendant has no standing to seek immunity for a defense witness. *U.S. v. Lenz,* 616 F.2d 960 (6th Cir. 1980); *U.S. v. All State Mortgage Corp.*, 507 F.2d 492 (7th Cir. 1974). In the granddaddy[6] of defense witness immunity cases, the Circuit for the District of Columbia held that refusing to grant a defense witness immunity does not implicate *Brady* type considerations. *Earl v. United States,* 361 F.2d 531 (D.C. Cir. 1966). Other Courts have vaguely suggested that once a Defendant establishes a need for witness immunity, refusal by the government to grant immunity may implicate *Brady. United States v. Klauber,* 611 F.2d 512 (4th Cir. 1979), cert. den. 100 S.Ct. 1835 (1980); *United States v. Carman,* 577 F.2d 556 (9th Cir. 1978).

The absence of this Court's guidance on the issue has resulted in confusion, even within Texas' own jurisprudence. Compare *Ross v. State,* supra, 486 S.W.2d 327 (Tex.Cr.App. 1972) [Court without power to grant defense request for immunity of witness] with *Norman v. State,* 588 S.W.2d 340 (Tex.Cr.App.

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[6] *Defense Witness Immunity and the Right to a Fair Trail,* 129 *University of Pennsylvania Law Review,* p. 337 (1980).

1979) [Failure to grant defense request for immunity was error of constitutional magnitude].[7]

This Court previously established a judicially conferred immunity for the Defendant who testifies at a hearing on a motion to suppress evidence. *Simmons v. United States,* 88 S.Ct. 967 (1968). This form of immunity amounts to an exclusionary rule which prohibits a Defendant's suppression hearing testimony from being used against him at his subsequent trial. This form of immunity is akin to use immunity which Courts have held is all that is required under the Constitution to override the Fifth Amendment privilege of a witness who refuses to testify. *Kastigar v. United States,* 92 S.Ct. 1653 (1972); *Ex parte Shorthouse,* 640 S.W.2d 924 (Tex.Cr.App. 1982). The Court in *Simmons* found the grant of such immunity necessary to effectuate the Defendant's fourth amendment rights.

In *Washington v. Texas,* 87 S.Ct. 1920 (1967), this Court struck down as violative of the sixth amendment right to compulsary process, state laws that prohibited participants in a crime from testifying on behalf of a coparticipant. The Court broadly construed the compulsary process clause as the right "to present a defense, the right to present the Defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." *Id.* at 1925.

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[7] Texas Intermediate Appellate Courts to consider the issue have followed the *Ross* rational, and the *Norman* case under the issue has never been addressed by them. *Taylor v. State,* 638 S.W.2d 602 (Tex.App. 5th Dist. 1982); *Fuentes v. State,* 662 S.W.2d 19 (Tex. App. 1st Dist. 1983); and *Smith v. State,* supra.

Weighing the principles of *Brady* and *Washington* together when considered in light of the logistics of *Simmons,* one can not but believe that this Court will, at some date, address the issue and opt for some form of defense witness immunity. The Courts firm establishment of such a remedy would be in full accord with the principle of equal justice which was best described by the Ohio Court in *Broady, supra*:

> Justice would seem to require that immunity from prosecution based solely upon the testimony of a witness should not be denied solely because such testimony would tend to exonerate a defendant in a criminal case, and be granted only when such testimony would tend to convict the defendant.

321 N.E.2d 890 at 895.

The present case offers an excellent opportunity for this Court to explicate the law on this issue.

As to Petitioner's Fourth Amendment claim, Certiorari should be granted because the Court of Appeals decision conflicts with this Court's holding in *Texas v. Brown,* 103 S.Ct. 1535 where it is stated at 1546:

> All of these cases, however, demonstrate that the constitutionality of a container search is not automatically determined by the constitutionality of the prior search. See *Chadwick, supra,* 433 U.S. at 13-14 n.8, 97 S.Ct., at 2484-2485, n.8; *Sanders, supra,* 442 U.S. at 761-762, 99 S.Ct., at 2591-2592. Separate inquiries are necessary, taking into account the separate interests at stake.
>
> If a movable container is in plain view, seizure does not implicate any privacy interests. There-

> fore, if there is probable cause to believe it contains contraband, the owner's possessory interest in the container must yield to society's interest in making sure the contraband does not vanish during the time it would take to obtain a warrant. The item may be seized temporarily. It does not follow, however, that the container may be opened on the spot. Once the container is in custody, there is no risk that evidence will be destroyed. Some inconvenience to the officer is entailed by requiring him to obtain a warrant before opening the container, but that alone does not excuse the duty to go before a neutral magistrate. *Johnson v. United States,* 333 U.S. 10, 15, 68 S.Ct. 367, 369, 92 L. Ed. 436 (1948); *McDonald v. United States,* 335 U.S. 451, 455, 69 S.Ct. 191, 193, 93 L. Ed. 153 (1948). As Justice POWELL emphasizes, *ante,* at 1544, the Warrant Clause embodies our government's historical commitment to bear the burden of inconvenience. Exigent circumstances must be shown before the Constitution will entrust an individual's privacy to the judgment of a single police officer.

In the present case, the Texas Courts never addressed whether the opening of the locked container implicated the Petitioner's individual privacy rights. Under the doctrine of this Court's holding in *Stone v. Powell,* 96 S.Ct. 3037 (1976) the opportunity to ever obtain a ruling on the merits of this issue will be forever lost if this Honorable Court does not grant the writ.

For these reasons, the Court is urged to grant the writ prayed for.

Respectfully submitted,

ENGEL, JONES & WILSON, P.C.

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(713) 965-0404

Attorney For Petitioner

APPENDIX

Cause No. 01-84-0056-CR

In The Court of Appeals
For the First Supreme Judicial District
of Texas at Houston

CYRIL J. SMITH,

Appellant,

VS.

THE STATE OF TEXAS,

Appellee.

[FILED AUGUST 13, 1985]

Motion To Supplement The Record On Appeal

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now, James A. Moore, Attorney for Appellant Cyril J. Smith and files this Motion to Supplement the Record on Appeal and as grounds for same would show unto the Court as follows:

The Defendant was sentenced in this cause on November 11, 1983. The Defendant was on federal misdemeanor probation since January 24, 1980. From the 22nd day of February, 1984 and continuing until February 27, 1984 the United States Motion to Revoke Probation was heard by the Honorable Calvin Botley, United States Magistrate. On February 27, 1984 after hearing several days of testimony Judge Botley issued a "finding that the petition to revoke probation should not be granted." "It further orders that Cyril Smith be discharged from probation this date." A copy of said order is attached hereto as Exhibit "A".

During that hearing Ellen Clare O'Connell was called to Judge Botley's chambers and her testimony was taken "in camera". Witness O'Connell was represented by Attorney William Habern at this hearing. I now have rea-

son to believe and do believe that there exists a record of Judge Botley's "in camera" examination of witness O'Connell's testimony which completely shows my client, Cyril Smith, to be innocent of the offense of which he has been convicted and sentenced to seven years confinement. (See affidavit of Cyril J. Smith attached hereto as Exhibit "B".)

I must now file this motion to supplement this record to avoid a gross injustice in this case.

It is requested that this Court obtain a copy of said transcript of O'Connell's testimony from the United States Magistrate Court, "in camera", if necessary, and incorporate it into this record on appeal. Or, alternatively, this Court order the 184th District Court of Harris County, Texas is requested to conduct a hearing and if it becomes necessary to allow said transcript be subpoened, filed with that Court and forwarded to the Court of Appeals and supplemented into this record. The Defendant's brief on appeal is incorporated herein for all purposes in support of this Motion. To fail to act by the Court denies the Appellant effective assistance of Counsel, due process of law, equal protection of laws and suppresses direct *Brady v. Maryland* material.

Wherefore, premises considered, the Appellant prays that this Motion to Supplement the Record an appeal be granted.

Respectfully submitted,

/s/ JAMES A. MOORE
JAMES A. MOORE
Attorney For Appellant
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713/622-9216
State Bar No. 14348000

EXHIBIT "A"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Cr.No. H-3-79-326M

UNITED STATES OF AMERICA,
VS.

CYRIL J. SMITH, JR.

JUDGMENT AND ORDER

On or about the 22nd day of February, 1984, and continuing until February 27, 1984, the defendant herein, Cyril J. Smith, Jr., in proper person and by counsel, James Moore, appeared before the Court for violations of conditions of the defendant's probation as imposed by the Judgment of this Honorable Court on January 24, 1980, wherein the Court ordered that the defendant be committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of one (1) year and the defendant shall pay a fine of $1,000.00 as to each of Counts 1 through 3, to run consecutive to each other, execution of which was suspended and the defendant placed on probation, with supervision, for a period of three (3) years. The Court further ordered that the defendant pay the $3,000.00 fine during the term of probation at such times and in such amounts as will be worked out under the direction of the U.S. Probation Office. On June 12, 1980, the defendant paid the fine in full. On January 24, 1980, the defendant was placed on unsupervised probation with the condition that he violate no laws.

The alleged violations of probation were that:

1. On October 16, 1982, the probationer was arrested by Houston Vice Police Officers and charged with gambling promotion and possession of a controlled substance. On October 10, 1983, a jury of the 184th District Court in Harris County, Texas, found Cyril J. Smith, Jr., guilty of unlawfully, intentionally, and knowingly possessing a controlled substance, namely cocaine. On November 10, 1983, the Court sentenced Cyril J. Smith, Jr., to serve seven (7) years in the Texas Department of Corrections.

The Court, on February 27, 1984, after hearing several days of testimony, issued a finding that the petition to revoke probation should not be granted. It further orders that Cyril Smith be discharged from probation as of this date.

/s/ CALVIN BOTLEY
CALVIN BOTLEY
United States Magistrate

EXHIBIT "B"

State of Texas
County of Harris

Before me the undersigned authority on this day appeared Cyril J. Smith who upon his oath stated the following:

I am Cyril J. Smith, Appellant in cause number 01-84-0056-CR styled Cyril J. Smith v. The State of Texas pending before the First Court of Appeals. I have been advised by Ellen Clare O'Connell that she told United States Magistrate Calvin Botley under oath that I did not possess the cocaine for which I have been convicted and that she told him who did. While I was reviewing the brief to be filed this date by my attorney James A. Moore, I advised him of this situation and he asked me to prepare this affidavit.

/s/ CYRIL J. SMITH
CYRIL J. SMITH

Sworn to and subscribed before me the undersigned authority on this the 13th day of August 1985.

/s/ UNREADABLE
NOTARY PUBLIC in and for
Harris County, Texas

My Commission expires:
7-14-86

[Certificate of Service Omitted in Printing]

NO. 366,410

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
184TH JUDICIAL DISTRICT

THE STATE OF TEXAS,

VS.

CYRIL J. SMITH,

[FILED OCTOBER 6, 1983]

MOTION FOR GRANT OF IMMUNITY
FOR DEFENSE WITNESSES

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Cyril J. Smith, Defendant in the above and entitled cause and files this *Motion for Grant of Immunity for Defense Witnesses* and as grounds for same would respectfully show unto the Court as follows:

The testimony concerning the appearance of defense witnesses John J. Lampis, and Ellen Clare O'Connell on the afternoon of October 5, 1983 is referred to and incorporated herein.

The Sixth Amendment "compulsory process clause" guarantees a defendant the right to have the attendance and testimony of witnesses in his behalf. *Chambers v. Mississippi,* 410 US 284.

The Courts have recognized the defendants' right to compulsory testimony under a grant of immunity under certain limited circumstances, where:

(1) The witnesses testimony is essential to an effective defense.
(2) The witness is available to testify.
(3) The testimony sought is "clearly exculpatory", and
(4) There is no showing of "strong governmental" interests against the grant of immunity;

U.S. v. Morrison, 535 F.2d 233 (3rd Cir. 1966); *Virgin Islands v. Smith,* 615 F.2d 964 (3rd. Cir. 1980); *U.S. v. DePalma,* 476 F.Supp. 775 (S.D.N.Y. 1979).

In this cause

(1) The testimony of Lampis and O'Connell are essential to an effective defense.

(2) Both are under subpoena and in Court.

(3) Their testimony is "clearly exculpatory" for defendant Smith and will be exhibited at a hearing hereunder.

(4) The State has not filed charges against either witnesses for approximately one year since the offense and both are in equal or very similar position to Defendant Smith as to possession of the cocaine found at 2610 Yoakum on October 16, 1982.

It has been held that as between the two a witness Fifth Amendment right to remain silent takes precedence over Defendants Sixth Amendment right to compel his testimony. *U.S. v. Goodwin,* 625 F.2d 693 (5th Cir. 1980).

Where a witness seeks to be excused from testifying on the basis that his testimony will violate his Fifth Amendment privilege against self-incrimination, the Fifth Circuit has developed the practice whereby, outside the presence of the jury, the trial judge examines the witness to determine whether reasonable grounds exist to uphold the privilege. *U.S. v. Sheikh,* 654 F.2d 1054, at p. 1072 (5th Cir. 1981); *U.S. v. Goodwin,* 608 F.2d 147 (5th Cir. 1980). It is the assertion of the privilege coupled with the court's in camera determination that will exonerate a witness from testifying. *U.S. v. Sheikh, supra,* at p. 1072.

To sustain the privilege and excuse a witness from testifying the court must find that the claimant, "is confronted by substantial and real . . . hazards of incrimination." *U.S. v. Apfelbaum,* 390 U.S. 39 (1980).

Where the witness' answers "might be used against him in any subsequent criminal proceeding invocation of the Fifth Amendment privilege would justify excusing the testimony." In re *Corregated Container Antitrust Litigation,* 644 F.2d 70 (5th Cir. 1981).

As to the Supreme Court noted in *U.S. v. Hoffman,* 341 U.S. 479 (1951), "to sustain the privilege, it need only be evident from the implications of the question . . . that a responsive answer . . . might be dangerous because injurious disclosure could result."

WHEREFORE PREMISES CONSIDERED, the Defendant moves the Court to conduct a hearing and thereafter grant witnesses Lampis and O'Connell immunity to insure the Defendants right to equal protection of law and due process. *Webb v. Texas,* 409 U.S. 95.

—Respectfully submitted,

/s/ JAMES A. MOORE
JAMES A. MOORE

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(713) 869-1427
State Bar No. 14348000

Attorney for Defendant

AFFIDAVIT

STATE OF TEXAS
COUNTY OF HARRIS

BEFORE ME, the undersigned authority, personally appeared ELLEN CLAIRE O'CONNELL, who upon her oath deposed and said as follows:

My name is ELLEN CLAIRE O'CONNELL. In October of 1982, Cyril Smith, Jr. was arrested for possession of cocaine. At the time of Cyril's arrest, he and I lived together at 2610 Yoakum Boulevard in Houston, Texas. It was at this address that the cocaine alleged to be Cyril's was found.

At the time of Cyril's trial I was called to testify for him but took the fifth amendment on the advice of my attorney. At the time of the trial, I very much wanted to testify on Cyril's behalf however, Kay Burkhalter, the assistant district attorney trying the case, emphatically informed me that if I testified, I would be indicted for possession of cocaine. Because of this treat, and based upon the advice of my attorney, I refused to testify at Cyril's trial.

I have now been informed by Mark Wilson (one of Cyril Smith's attorneys) that the statute of limitations has run on possession of the cocaine found in October of 1982 at 2610 Yoakum Boulevard in Houston, Texas. Because I can no longer be prosecuted in this matter, I am now willing to testify to the true facts concerning this case. I am now willing to testify through this affidavit, at a Motion for New Trial, or if need be, at a new trial for Cyril Smith, Jr.

The information that I have would completely exonerate Cyril Smith, Jr. with reference to the possession of cocaine charge. The cocaine found at 2610 Yoakum Boulevard did not belong to Cyril Smith, Jr. In fact, he had no knowledge

that the cocaine was present in the apartment. The cocaine found in the bedroom of the residence was mine.

I believe my testimony would have been very persuasive to the jury had I not been persuaded not to testify by Kay Burkhalter and my attorney.

All of the above facts are true and correct so help me God.

SIGNED this 15th day of February, 1987.

/s/ ELLEN CLAIRE O'CONNELL
ELLEN CLAIRE O'CONNELL

SUBSCRIBED AND SWORN TO before me on this the 15th day of February, 1987, by the said ELLEN CLAIRE O'CONNELL, witness my hand and official seal.

/s/ RHONDA L. ALLEN
Notary Public - State of Texas

Printed name: Rhonda L. Allen
Commission expires: 10/28/88